Supreme Court, U.S.
FILED
JAN 3 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1979

Docket No. 79-1048

State of Minnesota,

Respondent,

vs.

Jeffrey E. Carlson,

Appellant.

JURISDICTIONAL STATEMENT

KURZMAN AND MANAHAN

MARC G. KURZMAN
601 West Butler Square
Minneapolis, MN 55403
(612) 333-4403

Attorney for Appellant

TABLE OF CONTENTS

Page

Jurisdictional Statement.....1

Questions Presented.....9

APPENDIX INDEX:

A - Order of Hennepin County dated April 10, 1978.....1a

B - Order of Ramsey County dated February 17, 1978.....1b

C - Opinion of Minnesota Supreme Court dated August 3, 1979.....1c

D - Denial of Petition for Rehearing dated October 5, 1979.....1d

E - Notice of Appeal to U.S. Supreme Court dated November 5, 1979.....1e

JURISDICTIONAL STATEMENT

1. (a) Appellant Carlson was charged with possession of cocaine with intent to sell and with the sale of cocaine in the District Courts of both Hennepin and Ramsey Counties in the State of Minnesota.

In the proceeding in Hennepin County, Appellant moved at the omnibus hearing on February 6, 1978, for a dismissal of the complaint on the grounds that the statute under which he was charged was unConstitutional, in violation of the equal protection and due process clauses of the United States Constitution. On April 10, 1978, the Hennepin County District Court for the Fourth Judicial District denied Appellant's motion. The Order was not reported. A copy of the Order, File Nos. 772454 and 772457, is appended and is entitled Appendix A.

In the proceedings in Ramsey County, Appellant moved at the omnibus hearing on February 8, 1978, for a dismissal of the complaint on the grounds that the statute under which he was charged was unConstitutional, in violation of the equal protection and due process clauses of the United States Constitution. On February 17, 1978, the Ramsey County District Court for the Second Judicial District denied Appellant's motion. The Order was not reported. A copy of the Order, File No. 30115, is appended and is entitled Appendix B. Appellant was convicted in a trial to the court on February 14, 1978. The findings of the trial court are not reported.

The cases were consolidated for appeal and the trial courts certified the Constitutional questions for appeal. Arguments were heard before the Supreme

Court of the State of Minnesota on February 22, 1979. The Supreme Court of the State of Minnesota held against Appellant. The opinion was filed on August 3, 1979. The Appellant petitioned for rehearing, and the petition was denied on October 5, 1979. Judgment against Appellant was entered on October 5, 1979. The judgment, Nos. 48550, 48871, 48880 and 49788, is not yet reported. A copy of the judgment is appended and is entitled Appendix C. A copy of the denial of the Petition for Rehearing is appended and is entitled Appendix D.

(b)(i) This proceeding is an appeal from a judgment of the Supreme Court of the State of Minnesota wherein was drawn in question the validity of a statute of the State of Minnesota on the grounds of its being repugnant to the United States Constitution and the decision was in

favor of its validity.

This appeal is brought pursuant to 28 U.S.C. § 1257(2).

(ii) The judgment was filed August 3, 1979. The judgment was entered October 5, 1979. The Petition for Rehearing was filed on August 14, 1979, and the Petition was denied on October 5, 1979. Notice of Appeal was filed on November 5, 1979, in the Supreme Court of the State of Minnesota.

(iii) This appeal is brought pursuant to 28 U.S.C. § 1257(2).

(iv) The validity of Minnesota Statutes, §§ 152.01 and 152.02, as those statutes relate to the classification of cocaine as a Schedule II narcotic, are drawn into question.

The statutes may be found in Minnesota Statutes Annotated (hereinafter

referred to as M.S.A.), §§ 152.01 and 152.02; volume 11, pp. 438-439; pp. 200-206, pocketpart.

(c) The questions presented by this appeal are as follows:

-WHETHER THE CLASSIFICATION, FOR PENALTY PURPOSES, OF COCAINE IN SCHEDULE II, M.S.A. § 152.02, SUBD. 3(1)(d), IS INAPPROPRIATE BASED ON THE CRITERIA FOR CLASSIFICATION IN SCHEDULE II AS SET FORTH IN M.S.A. § 152.02, SUBD. 7(2)?

-WHETHER SUCH LEGISLATIVE DETERMINATION WITHOUT HEARINGS NOR DEBATE WITH RESPECT TO THE "HARMFULNESS" OF COCAINE IS ARBITRARY AND IRRATIONAL?

-WHETHER M.S.A. § 152.02, SUBD. 2, BY ITS INCLUSION OF COCAINE WITH OPIUM AND AMPHETAMINES IS SO OVERINCLUSIVE, AND BY ITS OMISSION OF ALCOHOL, CAFFEINE AND NICOTINE IS SO UNDERINCLUSIVE AS TO CONSTITUTE AN ARBITRARY AND IRRATIONAL CLASSIFICATION FOR PENALTY PURPOSES, AND IS THEREFORE VIOLATIVE OF THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION?

(d) Appellant Carlson was charged with possession of cocaine with intent to sell and with the sale of cocaine in the District Courts of both Hennepin and Ramsey Counties in the State of Minnesota.

In the proceeding in Hennepin County, Appellant moved at the omnibus hearing on February 6, 1978, for a dismissal of the complaint on the grounds that the statute under which he was charged was unConstitutional, in violation of the equal protection and due process clauses of the United States Constitution. On April 10, 1978, the Hennepin County District Court for the Fourth Judicial District denied Appellant's motion. The District Court held that it was "readily apparent that a comprehensive plan of

legislation" existed for the classification of cocaine as a Schedule II narcotic, "and that a purposeful criteria for rational and intelligent reviewing of change has been structured. This legislative design allows the defendants themselves the opportunity to partake in and supply input to statutory development or redevelopment. There is nothing present on the record to indicate to this Court that the evidence and testimony brought forth by the defendants or the State of Minnesota's objections for that matter, cannot be offered before the legislature, State Board of Pharmacy, and its advisory council." Appendix A, File Nos. 772454 and 772457, pp. 3-4.

In the proceeding in Ramsey County, Appellant moved at the omnibus hearing on February 8, 1978, for a dismissal of the complaint on the grounds that the

statute under which he was charged was unConstitutional, in violation of the equal protection and due process clauses of the United States Constitution. On February 17, 1978, the Ramsey County District Court for the Second Judicial District denied Appellant's motion. The court's Order stated:

> "The classification of cocaine as a substance which has a high potential for abuse which may lead to severe psychological or physical dependence under Minnesota Statutes 152.02, Subd. 3, is not in a legislative sense arbitrary or irrational so as to cause it to be a violation of the due process or equal protection clauses of the United States Constitution.
>
> "The classification of cocaine as a Class II drug under Minnesota Statutes 152.02, Subd. 3, which class includes opium and amphetamines and excludes alcohol, nicotine and caffine (sic), is not arbitrary or irrational so as to render that statute violative of the equal protection or due process clauses of the United States Constitution.

Appendix B, File No. 30115, pp. 3-4.

Appellant Carlson was convicted on two counts of possession of cocaine with intent to sell and the sale of cocaine in a trial to the court on February 14, 1978. the trial was in the Ramsey County District Court for the Second Judicial District in the State of Minnesota. The decision was not reported.

On April 14, 1978, the trial courts certified the cases to the Supreme Court of the State of Minnesota. On May 4, 1978, the cases were consolidated for the purpose of appeal. Arguments before the Supreme Court of the State of Minnesota were held on February 22, 1979. The Court filed its opinion on August 3, 1979, affirming the decisions of the trial courts. The Court held:

> "We agree with the trial courts that there is a rational basis for the legislation, and that the

legislation offends neither equal protection, due process, nor privacy rights ensured by the United States and Minnesota Constitutions; consequently, the orders and judgments are affirmed.

Appendix C, File Nos. 48550, 48871, 48880 and 49788, p. 2.

(e) A copy of the opinion by the Supreme Court of the State of Minnesota is appended and is entitled Appendix C.

(f) A copy of the order denying the Petition for Rehearing before the Supreme Court of the State of Minnesota is appended and is entitled Appendix D.

(g) A copy of the Notice of Appeal filed with the Supreme Court of the State of Minnesota is appended and is entitled Appendix E.

KURZMAN & MANAHAN
Marc G. Kurzman
601 West Butler Square
Minneapolis, MN 55403
Attorney for Appellant

APPENDIX A

ORDER OF HENNEPIN COUNTY

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,
-vs-
Jeffrey E. Carlson,
Defendant.

ORDER

File Nos. 772454 and 772457

The above-entitled matters came on for hearing before the Honorable Patrick W. Fitzgerald, Judge of the District Court, on February 6, 1978, pursuant to a motion by the defendant to dismiss Counts I and II of the complaints on the grounds that the statutes under which he is charged are unconstitutional, in violation of the Equal Protection and Due Process

Clauses of the United States Constitution. Marc G. Kurzman, Esq., appeared on behalf of the defendant, Jeffrey E. Carlson, and in support of the motion. William B. Edwards, Esq., Assistant County Attorney, appeared on behalf of the State of Minnesota and in opposition to the motion.

The Court, having heard the arguments of counsel and upon all the files, records and proceedings herein, makes the following Order.

IT IS HEREBY ORDERED that the defendant's motion is in all respects denied.

Dated this 10 day of April, 1978.

s/Patrick W. Fitzgerald

PATRICK W. FITZGERALD

Judge of the District Court

M E M O R A N D U M

The defendant Jeffrey Eric Carlson having been charged under two separate complaints of Unlawful Sale of a Schedule II Narcotic Controlled Substance (cocaine) seeks dismissal of said charges based upon grounds that the statutes defendant was charged under were passed by the Minnesota legislature in violation of his constitutional rights to due process and equal protection of the law.

More specifically the defendant argues that the classification of cocaine in Schedule II, Minnesota Statutes, Section 152.02, Subd. 3 (1) (d),:

> "Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include de-cocainized coca leaves or

> extraction of coca leaves, which extractions do not contain cocaine or ecgonine."

is inappropriate based on the criteria for classification in Schedule II as set forth in Minnesota Statutes, § 152.02, Subd. 7 (2),:

> "The board of pharmacy shall place a substance in Schedule II if it finds that the substance has: A high potential for abuse, currently accepted medical use in the United States, or currently accepted medical use with severe restrictions, and that abuse may lead to severe psychological or physical dependence."

and that such classification of cocaine in Schedule II is arbitrary and lacks any basis in rationality.

The question of constitutionality calls to the Court's attention a well settled benchmark; that is, that every law is presumed to be constitutional. The Court noted in Grube v. Oak Center

Creamery Co., 262 Minn. 60, 61 (1962),

> "It is well established that every law is presumed to be constitutional in the first instance and that an act will not be declared unconstitutional unless its invalidity appears clearly or unless it is shown beyond a reasonable doubt that it violates some constitutional provision."

Further, in State v. Corbett, 57 Minn. 345, 350 (1894),

> "...to warrant the judiciary in declaring a statute invalid they must be able to point out some constitutional limitation which the act clearly transcends."

Thus, being cognizant of the constitutional presumption and yet aware of the arguments of counsel for the defense suggesting that the action of the legislature in classifying cocaine in Schedule II is arbitrary and lacks any basis in rationality, this Court shall examine the legislative machinery to

determine whether or not,

1) a formula for a rational means to a legislative end exists, and

2) does the formula state a criterion for the law making process.

In viewing Minnesota Chapter 152, prohibited drugs and more specifically M.S. 152.08, Subd. 8, the Court finds that a review of the placement of controlled substances shall annually be made by the state board of pharmacy after consulting with the advisory council,

> "Subd. 8. The state board of pharmacy may, by regulation, add substances to or delete or reschedule substances listed in this section. The state board of pharmacy, after consulting with the advisory council on controlled substances, shall annually, on or before May 1 of each year, conduct a review of the placement of controlled substances in the various schedules" (emphasis added).

In addition, the legislature has provided criteria for the board of pharmacy to use in making a determination regarding a particular substance, M.S. 152, Subd. 8,

> "In making a determination regarding a substance, the board of pharmacy shall consider the following: The actual or relative potential for abuse, the scientific evidence of its pharmacological effect, if known, the state of current scientific knowledge regarding the substance, the history and current pattern of abuse, the scope, duration, and significance of abuse, the risk to public health, the potential of the substance to produce psychic or physiological dependence liability, and whether the substance is an immediate precursor of a substance already controlled under this section. The state board of pharmacy may include any non-narcotic drug authorized by federal law for medicinal use in a schedule only if such drug must, under either federal or state law or regulation, be sold only on prescription."

The legislature has further provided for an advisory council with a membership consisting of a cross-section of drug related areas, M.S. 152, Subd. 11,

> "Commencing July 1, 1973, six members shall be appointed for a one year term and seven members shall be appointed for a two year term. Thereafter, members shall be appointed for two year terms. Four of the members of the council shall be physicians as designated by the state board of medical examiners. One of the members of the council shall be a pharmacologist, one of the members of the council shall be a pharmacist, and the remainder shall be from among the following: correction or law enforcement officers, judges, representatives of drug treatment or counseling facilities, former drug abusers, education, and students. The members of the council shall select a chairman from among their membership, who may call meetings of the council when deemed appropriate, and shall call meetings of the council when requested to do so by any four members of the council."

Lastly, Subd. 13 of M.S. 152.02 provides that,

> "The state board of pharmacy and the advisory council on controlled substances shall study the implementation of Laws 1971, Chapter 937 in relation to the problems of drug abuse in Minnesota and shall report to the legislature annually on or before December 1, their recommendations concerning amendments to laws 1971, Chapter 937."

Having reviewed the statutory machinery of M.S. 152, it is readily apparent that a comprehensive plan of legislation exists, and that a purposeful criteria for rational and intelligent reviewing of change has been structured.

This legislative design allows the defendants themselves the opportunity to partake in and supply input to statutory development or redevelopment.

There is nothing present on the record to indicate to this Court that the evidence and testimony brought forth by

the defendants or the State of Minnesota's objections for that matter, cannot be offered before the legislature, state board of pharmacy and its advisory council.

It is this input to the legislative process which is both needed and necessary to sustain our representative form of government.

To allow judicial interference in the development of the law making process would only manifest a deterioration of the concept of separation of powers.

Let this memorandum be made a part of the foregoing Order.

P.W.F.

APPENDIX B

ORDER OF RAMSEY COUNTY

STATE OF MINNESOTA — IN DISTRICT COURT
COUNTY OF RAMSEY — SECOND JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,

-vs- ORDER

Jeffrey E. Carlson, File No. 30115
Defendant.

This matter came on for hearing before the undersigned Judge of District Court as a part of the Omnibus Hearing herein on February 8, 1978. Mr. James Konen, Assistant Ramsey County Attorney, appeared for the State of Minnesota; Mr. Marc G. Kurzman, Attorney at Law, appeared as counsel for defendant-movant. The defendant has moved the Court to dismiss Counts I and II of the Complaint against defendant, being, Count I,

Distribution of Cocaine, and, Count II, Possession of Cocaine with Intent to Distribute, on the grounds that the statute under which he is charged is unconstitutional, in violation of the equal protection and due process clauses of the United States Constitution.

As a part of defendant's Omnibus hearing, defendant supported his Motion by the deposition of Dr. Ronald Siegel, taken February 6, 1978, and admitted as testimony in this matter by stipulation of defendant and the state as Defendant's Omnibus Hearing Exhibit 1. Defendant further submitted an exhaustive brief with appendicies.

The state submitted as its brief and argument in opposition to defendant's Motion the Order of Judge Crane Winton in State v. Vernon, State of Minnesota,

Fourth Judicial District, File 68382.

The sole issue presented to the Court is whether Minnesota Statutes 152.02, Subd. 2, by its inclusion of cocaine with opium and amphetamines is so overinclusive, and by its omission of alcohol, caffine and nicotine is so underinclusive as to constitute an arbitrary and irrational classification for penalty purposes, violative of the equal protection and due process clauses of the United States Constitution.

Upon all the testimony adduced, upon the briefs and memorandum submitted, upon all the files and records herein, the Court finds that the uncontroverted evidence indicates:

1. Cocaine is a stimulant drug which is not botanically related to opium and other narcotic, depressive drugs.

2. Cocaine does not produce any physiological tolerance in man, nor does it produce an abstinence syndrome or withdrawal response and is, therefore, non-addictive.

3. In 1914 Congress felt some control of cocaine was necessary, and included it within the provisions of the Harrison Narcotic Act without hearings as to its classification as a narcotic, and no evidentiary hearings have ever been held by congress upon the nature of cocaine as a stimulant and not a depressant, that is, a narcotic drug, through the passage of the Comprehensive Drug Act of 1970.

4. Some text books continue to classify cocaine as a narcotic.

5. Cocaine causes certain short-term physiological effects, such as difficulty in getting to sleep, interference

with reading ability, increased heart rate, sores and inflammation of skin and membranes, and some cellular damage. It may also cause occasional insomnia and restlessness and a tingling or itching sensation.

6. Psychologically cocaine causes short-term mood elevation; positive euphoric experiences; increasing sensitivity to things, hypersensitivity; hyperexciteability; irritability; and hallucinations, which are comparatively mild when compared with narcotic hallucinations, and are considered by some to be pseudo hallucinations, which are non-psychotic.

7. The toxicity of cocaine depends upon the route of administration, the speed with which it is introduced into the body, and over what period of

time. When taken with narcotics or when injected into the blood, or ingested orally in large quantities, it can cause death.

8. Although usually considered a non-addictive drug, a small percentage of persons are compulsive users.

9. A distinction must be drawn between cocaine in its pure state or when mixed with bland substances, and cocaine as it is illicitly sold on the streets in combination with toxic or narcotic mixtures, the latter being potentially toxic or habituating.

10. Cocaine is used medically as a local anesthetic, and has potential in treatment of obesity.

11. Alcohol is addictive and causes violent behavior in some, and consequently is a crime related drug, while cocaine is not.

12. Nicotine and caffine can cause some of the short term effects listed in Findings 5 and 6, such as insomnia, irritability, and hyper-excitability, increased heart rate, and are more addictive than cocaine.

13. Scientific studies are still in process as to the effects of cocaine on man.

14. In California and Massachusetts legislative evidentiary hearings were held on the classification of cocaine as a narcotic, but no legislative change has occurred as yet in those states.

15. Minnesota Statutes 152.02, Subd. 3, by its terms is not directed to any particular class of persons but applies to all members of the public.

CONCLUSIONS OF LAW

1. The classification of cocaine

as a substance which has a high potential for abuse which may lead to severe psychological or physical dependence under Minnesota Statutes 152.02, Subd. 3, is not in a legislative sense arbitrary or irrational so as to cause it to be a violation of the due process or equal protection clauses of the United States Constitution.

2. The classification of cocaine as a Class II drug under Minnesota Statutes 152.02, Subd. 3, which class includes opium and amphetamines and excludes alcohol, nicotine and caffine is not arbitrary or irrational so as to render that statute violative of the equal protection or due process clauses of the United States Constitution.

3. The Court has jurisdiction to proceed in this matter.

4. Defendant's Motion to dismiss Counts I and II of the Complaint herein should be denied.

Wherefore,

IT IS ORDERED, DETERMINED AND ADJUDGED that defendant's Motion to dismiss is denied.

BY THE COURT:

s/E. Thomas Brennan
E. THOMAS BRENNAN
Judge of the District Court

Dated this 17th day of February, 1978.

M E M O R A N D U M

The Court has carefully reviewed all the material submitted, and has concluded that whereas the classification of cocaine as a Schedule II drug may not be consonant with prevailing, contemporary medical and scientific thought, a basis for such classification exists which is rational in the legislative sense.

The state has submitted as its brief and argument the decision of Judge Crane Winton in State v. Vernon, Fourth Judicial District File No. 68382. This Order appears to succinctly state the conclusions of this Court as to the reasoning behind its decision, and this Court concurs and adopts the reasoning of Judge Winton in so far as it bears upon the issue in this case..

Further, the Court has considered the following Federal cases cited by defendant in his brief.

U.S. v. Carolene Products Co. (1938), 304 U.S. 145, as a foundation for defendant's position that classification of articles as well as people can be violative of the equal protection clause of the Fifth Amendment to the United States Constitution:

> Similarly we recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition. (304 U.S. at 153 and 154.)

A limitation, however is imposed on the use of evidence aimed at striking down such legislative judgment:

> But by their very nature such inquiries, where legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it. (304 U.S. at 154)

Marshall v. United States (1974), 94 S. Ct. 700, 414 U.S. 417, further cautions courts not to rewrite legislation, while holding that congress could determine that addicts with two or more prior felony convictions are not denied due process or equal protection by being excluded from consideration for rehabilitative commitment in lieu of penal incarceration, albeit judicial discretion might be preferable.

> When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation, even assuming, arguendo, that judges with more direct exposure to the problem might make wiser choices. (94 S.Ct. at 706, 414 U.S. 425)
>
> The Court has frequently noted that legislative classifications need not be perfect or ideal. (94 S.Ct. at 707, 414 U.S. 429)

U.S. v. Brookins (1974), 383 F.Supp. 1212:

> Congress could, in the comprehensive Drug Abuse Prevention and Control Act of 1970, rationally classify cocaine, a non-narcotic central nervous system stimulant, as a narcotic for penalty and regulatory purposes; in other words, the legal or congressional classification of cocaine as a narcotic did not have to mirror its medical classification. (383 F.Supp. at 1212)

U.S. v. Hobbs, 392 F.Supp. 444:

> Congress could rationally classify cocaine, a non-narcotic central nervous stimulant, as a narcotic for penalty and regulatory purposes.

As in the instant case, defendants in Hobbs contended that while cocaine is a drug of abuse, distribution of which congress could legitimately penalize, its misclassification deprived defendant of equal protection in violation of the Fifth Amendment.

Defendant here suggests that cocaine should be put within Class III or

even Class IV.

In dealing with the question of striking down the Federal legislation the Court in Hobbs asked,

> Is there some rational basis for the statutory classification?

In U.S. v Castro, 401 F.Supp 120 (1975), at page 125, the Court stated:

> Congress need not act wisely or scientifically, only constitutionally.

It is believed the four-pronged test of Castro is met here, and this Court cannot say there is no rational basis for the legislative classification of cocaine.

It is noted that in cases in which the federal government introduced witnesses to rebut defendant's contentions, the conclusion was that the cocaine question has not been settled with the finality or uniformity of scientific thought which Dr. Siegel and witnesses in similar state

court cases indicate. In any event, the detrimental effects of cocaine as admitted by Dr. Siegel form some rational basis for its proscription by the legislature.

The legislature has afforded ample opportunity for a change of classification of cocaine if warranted. Minnesota Statutes 152.02, Subd. 8, provides:

> The state board of pharmacy may, by regulation, add substances to or delete or reschedule substances listed in this section. The state board of pharmacy, after consulting with the advisory council on controlled substances, shall annually, on or before May 1 of each year, conduct a review of the placement of controlled substances in the various schedules.

The legislature by Subdivisions 8 through 13 of Minnesota Statutes 152.02 has indicated an open mind to classification change through the orderly process of a state agency with pharmacological expertise assisted by the advice of a

council of experts and laymen with a wide range of experience and training in the problem areas of drug control. Members of the advisory council are drawn from the ranks of "correction or law enforcement officers, judges, representatives of drug treatment and counselling facilities, former drug abusers, education and students" as well as from pharmacologists and pharmacists.

As indicated in U.S. v. Brookins and related cases, more than a bare medical, pharmaceutical or pharmacopoeia definition is involved in regulation of chemical abuse and dependency.

From their combined experience and knowledge both as to members with scientific, pharmacologist and pharmacist backgrounds and those who deal and live with the problems arising from the use and

sale of drugs, the advisory council could be of considerable assistance to the state board of pharmacy in its classification and reclassification of drugs as the literature and experience evolve in this area.

While the Court might not disagree with the findings of the trial courts in Massachusetts v. Miller, 20 Cr.L. 2331 (1976) or Alaska v. Erickson, and companion cases 76-5772 Cr., Third Judicial District, Superior Court, etc., the Court believes their decisions applied in this state would be inappropriate in view of the fact that our legislature has authorized continuous study of reclassification of drugs, and has vested power to change classifications in an agency whose members presumably can act with more flexibility and expertise than the

legislature itself.

Of course, it has not been shown that the Minnesota Legislature itself has not studied this classification or that it is unwilling to study the problems of classification. The Court will not assume the legislature has continued to blindly follow the congressional classification of drugs.

In short, drug classification for criminal penalty purposes is one of such broad ramification that affected persons and groups not before the Court should have input as is affordable to the legislative process, and involves a field traditionally within the purview of legislative judgment. Nor is the state of knowledge available so uniform and conclusive that this Court should strike down the legislative judgment.

E.T.B.

APPENDIX C

OPINION OF SUPREME COURT

No. 88 Hennepin County Kennedy, J.
Ramsey County

State of Minnesota,
Respondent,

48550 vs.

Harold Vernon,
Appellant,

and

State of Minnesota,
Respondent,

48871 and
48880 vs.

Jeffrey E. Carlson,
Appellant,

and

State of Minnesota,
Respondent,

49788 vs.

Dennis Henry Finlay,
Appellant.

Endorsed
Filed August 3, 1979
John McCarthy,
Clerk
Minnesota Supreme Court

S Y L L A B U S

1. The legislature's determination that cocaine has a high potential for

abuse and that abuse may lead to severe psychological dependence has not been rebutted by overwhelming evidence to the contrary.

2. Cocaine may be regulated as a narcotic for purposes of prescribing criminal penalties for its possession and distribution, though by pharmacological standards it is not a narcotic.

Affirmed.

Heard before Sheran, C. J., and Wahl and Kennedy, JJ., and considered and decided by the court en banc.

O P I N I O N

CHARLES W. KENNEDY, Justice.*

These consolidated appeals challenge the constitutionality of the regulation

*Acting as Justice of the Supreme Court by appointment pursuant to Minn. Const., art. 6, § 2, and Minn. St. 2.724, subd. 2.

of cocaine in the controlled substances law, Minn. St. c. 152.

Jeffrey E. Carlson was charged in Hennepin County with possession with intent to sell, and sale of cocaine in violation of Minn. St. 152.09, subd. 1(1). Harold Vernon was charged in Hennepin County with possession of cocaine in violation of Minn. St. 152.09, subd. 1(2). Their motions to dismiss were denied; the trial courts certified the question of constitutionality as important and doubtful; and they appeal.

Jeffrey E. Carlson and Dennis Finlay were convicted in separate proceedings in Ramsey County of possession with intent to distribute, and distribution of cocaine in violation of Minn. St. 152.09, subd. 1(1). They appeal from the Ramsey County judgments and from denial of their motions to dismiss.

Appellants contend that the degree to which cocaine is regulated is irrational, stating that:

> "* * * We are not arguing that the legislature lacks the police power to regulate use of cocaine. We are arguing that the degree to which it is regulated, by its classification as a narcotic, is completely lacking in reason. * * *
>
> * * * * *
>
> "The questions * * * are whether classifying cocaine as a narcotic is rational and whether classifying cocaine in Schedule II is rational."

We agree with the trial courts that there is a rational basis for the legislation, and that the legislation offends neither equal protection, due process, nor privacy rights ensured by the United States and Minnesota constitutions; consequently, the orders and judgments are affirmed.

The evidence and the findings of the trial courts show that cocaine, a

drug prepared from coca leaves, is a central nervous system stimulant; its short-term physiological effects include increase in heart rate and blood pressure, and pupil dilation; it lessens fatigue and hunger, produces euphoria, and can cause hyper-exciteability, insomnia, restlessness, and hallucinations, which are comparatively mild when compared with narcotic hallucinations, and which are considered by some to be pseudo-hallucinations which are non-psychotic. Prolonged use of cocaine can cause damage to membranes and psychological dependence with symptoms of depression and paranoia. It can be fatal when taken with narcotics, or injected into the blood, or ingested orally in large quantities.

Cocaine is not considered a narcotic pharmacologically because it is not related to opium and opiates, is not a

depressant, does not produce tolerance or withdrawal syndrome, and is not physically addictive.

1. Minn. St. c. 152[1] prohibits traffic in and possession of controlled substances, § 152.09, subd. 1, and establishes five schedules of such substances, § 152.02, subd. 1. Substances listed in Schedule II include, inter alia, opium, opiates, coca leaves, "and any salt, compound, derivative, or preparation of coca leaves," and amphetamines. § 152.02,

---

[1]"In 1971, Minnesota adopted in large part the Uniform Controlled Substances Act. L. 1971, c. 937. One of the major purposes of this act was 'to achieve uniformity between the laws of the several States and those of the Federal government.' 9 U.L.A. 146. This act, closely patterned after the Federal narcotic and dangerous drug law, 21 U.S.C.A. § 801, et seq., has now been adopted by 43 states. 11 M.S.A. 1977 Cumulative Annual Pocket Part, p. 162." State v. King, 257 N. W. 2d 693, 695 (Minn. 1977).

subd. 3.

Minn. St. 152.02, subd. 7(2), provides:

> "The board of pharmacy shall place a substance in Schedule II if it finds that the substance has: A high potential for abuse, currently accepted medical use in the United States, or currently accepted medical use with severe restrictions, and that abuse may lead to severe psychological or physical dependence."

The objection to listing cocaine in Schedule II raises the question of whether there are facts which support the legislation. United States v. Carolene Products Co., 304 U. S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938). The statutory listing of cocaine in Schedule II carries, by implication, legislative findings that it has a high potential for abuse, and that its abuse may lead to severe psychological dependence. In seeking a rational basis for the legislation, we must accept those findings in the absence of overwhelming evidence to the contrary. Minn.

State Bd. of Health v. City of Brainerd, 308 Minn. 24, 241 N.W. 2d 624 (1976).

There seems to be little dispute about the nature of the substance cocaine or, in general, the physiological and psychological effects of its abuse. It is not disputed that cocaine has currently accepted medical uses in the United States, or that, like most drugs, it has a potential for abuse and psychological habituation or dependence. There is testimony in the record that abuse may lead to psychological dependence. The dispute is about degrees - whether it has a high potential for abuse, or something less, and whether abuse may lead to severe psychological dependence, or something less. These are judgments for the legislature to make with the aid of the social and scientific expertise it can enlist. The evidence furnishes no reason to

believe that the factual propensities of cocaine and the consequences of its abuse were not known to the legislature when the statute was enacted.

The record contains abundant uncontradicted expert testimony to the effect that cocaine is regulated too severely, and that its potential for abuse and harmful consequences of abuse is less than that of alcohol, amphetamines, the opiates, and tobacco. But that testimony does not undermine the legislation in a constitutional sense because it does not overwhelmingly refute the implied legislative judgments that cocaine has a high potential for abuse, that abuse may lead to severe psychological dependence, and that such consequences of cocaine abuse justify its regulation.

Appellants concede that the state has a legitimate interest in regulating cocaine. Regulation by placing cocaine in Schedule II, based on legislative findings that cocaine has a high potential for abuse and that such abuse may lead to severe psychological dependence, is rational. Prohibiting and providing criminal penalties for possession of cocaine, except for personal use "authorized by law," Minn. St. 152.09, subd. 1(2), advance the legitimate interest of the state in regulating the substance. The regulation bears a "rational relationship to a permissible state objective" so there is no denial of equal protection of the law, State v. Vail, 274 N. W. 2d 127 (Minn. 1979), or of due process of law. The intrusion on the personal right to choose what to possess[2] is a necessary and

[2]See, generally, Tribe, American Constitutional Law, 905-910, 984-985(1978).

reasonable way of advancing the state interest. There is therefore no unconstitutional intrusion on a right of privacy or personal autonomy. Price v. Sheppard, 307 Minn. 250, 239 N. W. 2d 905 (1976); Minnesota State Bd. of Health v. City of Brainerd, supra.

2. Though cocaine is not a narcotic by pharmacological standards, Minn. St. 152.01, subd. 10, defines "narcotic drug" as "any of the following:

> "(1) Opium, coca leaves, and opiates;
>
> "(2) A compound, manufacture, salt, derivative, or preparation of opium, coca leaves, or opiates;* * *"

More severe penalties attach to violations with respect to narcotic drugs. Minn. St. 152.15. The federal statute contains the same definition, 21 U.S.C.A. § 802(16), and fixes more severe penalties to violations involving narcotic drugs. 21 U.S.C.A.

§ 960(b)(1). Federal appellate courts have held that the classification of cocaine as a narcotic is rational and constitutional. United States v. Solow, 574 F. 2d 1318 (5 Cir. 1978); United States v. Lane, 574 F. 2d 1019 (10 Cir. 1978); United States v. McCormick, 565 F. 2d 286 (4 Cir. 1977); United States v. Wheaton, 557 F. 2d 275 (1 Cir. 1977); United States v. Harper, 530 F. 2d 828 (9 Cir. 1976).

The legislature has tne authority to regulate cocaine to the same extent that it regulates opium and opiates. One way of accomplishing that is to classify them together as narcotic drugs, despite their phamacological differences. Apparently, by pharmacological standards, cocaine should not be grouped with opium and opiates. But that does not affect the power of the legislature to

group them together for purposes of prescribing the degree of regulation to be applied to the substance cocaine.

The orders and judgments are affirmed.

Affirmed.

APPENDIX D

DENIAL OF PETITION FOR REHEARING

STATE OF MINNESOTA

Office of Clerk of Supreme Court

ST. PAUL, MINN.

State of Minnesota,
Respondent,

vs.

Harold Vernon,
Appellant
(48550),

Jeffrey E. Carlson,
Appellant
(48871 and
48880)

Dennis Henry Finlay,
Appellant
(49788).

October 5, 1979

SIR:

You will please take notice that on this date the following order was entered in the above entitled causes:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,
John McCarthy
Clerk Supreme Court

APPENDIX E

NOTICE OF APPEAL TO U.S. SUPREME COURT

IN THE SUPREME COURT
OF THE STATE OF MINNESOTA

State of Minnesota, Respondent, vs. Jeffrey E. Carlson, Appellant.	)	Nos. 48871 48880

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Jeffrey E. Carlson, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Minnesota Supreme Court, affirming the judgment of conviction, entered herein on October 5, 1979.

Supreme Court, U. S.
FILED
JAN 3 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 79-1048

JEFFREY E. CARLSON

Appellant,

vs.

STATE OF MINNESOTA,

Appellee.

MOTION TO AFFIRM JUDGMENT OF THE SUPREME COURT OF MINNESOTA OR, IN THE ALTERNATIVE, TO DISMISS APPEAL

KURZMAN & MANAHAN
By: MARC G. KURZMAN
601 Butler Square West
Minneapolis, MN 55403
(612) 333-4403
Attorney for Appellant

WARREN R. SPANNAUS
Attorney General
State of Minnesota
820 American Center Bldg.
St. Paul, MN 55101
THOMAS FOLEY
Ramsey County Attorney
1100 Commerce Bldg.
St. Paul, MN 55101
By: STEVEN C. DeCOSTER
Assistant Ramsey County Attorney
1100 Commerce Bldg.
St. Paul, MN 55101
Telephone: (612) 298-5464
Attorneys for Appellee

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

IN THE

Supreme Court of the United States

No. _____

JEFFREY E. CARLSON

Appellant,

vs.

STATE OF MINNESOTA,

Appellee.

MOTION TO AFFIRM JUDGMENT OF THE SUPREME COURT OF MINNESOTA OR, IN THE ALTERNATIVE, TO DISMISS APPEAL

Appellee, State of Minnesota, in pursuance of Rule 16 of this Court, moves the Court for an Order dismissing the appeal noticed and filed in the above-captioned matter on November 5, and November 8, 1979, on the ground the case does not present a substantial federal question or, in the alternative, affirming the judgment rendered in the Supreme Court of Minnesota by Order of that Court denying appellant's petition for reargument on October 5, 1979, it being manifest that the questions on which decision of the cause depends are so unsubstantial as not to need further argument.

1. Appellant's jurisdictional statement was served on Appellee on January 4, 1980.

2. By this statement, appellant draws into question the decision of the Supreme Court of Minnesota finding valid Minnesota Statutes §§ 152.01 and 152.02 classifying cocaine as a Schedule II narcotic. (Jurisdictional Statement, p. 4.)

3. The questions presented (Jurisdictional Statement, p. 5) are three-fold, the first two of which obviously relate to issues of state law, and do not even purport to raise a question under the United States Constitution; they involve (a) the statutory basis for the classification, and (b) the failure to afford "legislative . . . hearings . . . with respect to the 'harmfulness' of cocaine," no federal right to "legislative hearings" existing.

4. The third issue is defined as:

> "—Whether M.S.A. § 152.02, Subd. 2, by its inclusion of cocaine with opium and amphetamines is so overinclusive, and by its omission of alcohol, caffeine and nicotine is so underinclusive as to constitute an arbitrary and irrational classification for penalty purposes, and is therefore violative of the equal protection and due process clauses of the United States Constitution?"

5. Since appellant raises solely a question of misclassification, and not any question of liberty or privacy in the right to use, possess or distribute cocaine, the rational relationship test of *United States v. Carolene Products Co.*, 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938) and no stricter test should be applied.

6. The statutes of the State of Minnesota (§ 152.02, Subdivisions 8-13) provide administrative procedures for change of any claimed misclassification of a controlled substance which should be exhausted, but were not by this appellant.

7. The precise issue here raised, the propriety of classification of cocaine as a Class II narcotic, has been repeatedly litigated in cases arising within the various District Courts and Courts of Appeal of the United States; as to a number of them this court has denied certiorari, and each and every one of them has, so far as appellee is aware, been squarely decided adversely to appellant's position. These cases have been reported at: *United States v. Amidzich*, 396 F.Supp. 1140, 1147 (E.D. Wisc., 1975); *United States v. Brookins*, 383 F. Supp. 1212 (D.N.J., 1974), *summarily aff'd*, 524 F.2d 1404 (3 Cir., 1975); *United States v. Castro*, 401 F.Supp. 120, 126 (N.D. Ill., 1975); *United States v. DiLaura*, 394 F.Supp. 770 (D. Mass., 1974); *United States v. Harper*, 530 F.2d 829 (9 Cir., 1976), *cert. denied*, 425 U.S. 977 (1976); *United States v. Hobbs*, 392 F.Supp. 444 (D. Mass., 1975); *United States v. Kiffer*, 477 F.2d 349, 356 (2 Cir., 1973), *cert. denied*, 414 U.S. 831 (1973); *United States v. Lindelow*, 435 F.Supp. 367 (D. Puerto Rico, 1977); *United States v. Marshall*, 532 F.2d 1279, 1288 (9 Cir., 1976); *United States v. Miller*, 387 F.Supp. 1097 (D. Conn., 1975); *United States v. Smaldone*, 484 F.2d 311 (10 Cir., 1973), *cert. denied*, 415 U.S. 915 (1974); *United*

States v. Umentum, 401 F.Supp. 746 (E.D. Wisc., 1975), *aff'd* (issue not raised) 547 F.2d 987 (7 Cir., 1976), *cert. denied*, 430 U.S. 986 (1977).

8. The Minnesota Statute (§§ 152.01—152.20) is substantially identical to the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §801 et seq., as amended in 1978, and to the Uniform Controlled Substances Act, which has been enacted in the vast majority of the fifty states and is daily applied to cases involving possession or sale of cocaine as a class II controlled substance.

9. Review of the type of questions of so-called overinclusiveness (classification *with* opium and amphetamines) or underinclusiveness (classification "omitting" alcohol, caffeine and nicotine) involves unwarranted judicial intrusion into the area of legislative decision, it being well settled that a policy need not deal with all evils to deal constitutionally with one admitted evil, and that questions of relative harm from controlled and uncontrolled substances are ones on which reasonable men may, and often do, differ.

WHEREFORE, appellee prays the Court enter an Order dismissing this appeal or, in the alternative, affirming the judgment of the Supreme Court of Minnesota of October 5, 1979, said Order denying reargument of the decision of the unanimous Court of August 3, 1979.

Respectfully submitted,

WARREN SPANNAUS
Attorney General
State of Minnesota
TOM FOLEY
Ramsey County Attorney
By: STEVEN C. DeCOSTER
Assistant Ramsey County
Attorney
200 Lowry Square
St. Paul, Minnesota 55102
Telephone: 298-4421
Attorneys for Appellee State of Minnesota

Dated: January 7, 1980.

FILED
JAN 3 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. ~~79-~~1048

JEFFREY E. CARLSON,
Appellant,

vs.

STATE OF MINNESOTA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

MOTION TO AFFIRM

MARC G. KURZMAN
KURZMAN & MANAHAN
Attorneys at Law
601 West Butler Sq.
Minneapolis, MN 55403
612/333-4403
Attorney for Appellant

WARREN SPANNAUS
Minnesota Attorney General
820 American Ctr. Bldg.
St. Paul, MN 55101
THOMAS L. JOHNSON
Hennepin County Atty.
VERNON E. BERGSTROM
Chief Appellate Section
By: DAVID W. LARSON
Assistant County Attorney
THOMAS A. WEIST, Esq.
A-2000 Government Center
Minneapolis, MN 55487
612/348-5528
Attorneys for Appellee

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

IN THE

Supreme Court of the United States

October Term, 1979

No. _____

JEFFREY E. CARLSON,

Appellant,

vs.

STATE OF MINNESOTA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

MOTION TO AFFIRM

Pursuant to Supreme Court Rule 16(1)(c), Respondent, State of Minnesota, moves to affirm the above entitled appeal from the decision of the Minnesota Supreme Court on the grounds that the jurisdictional statement does not present a substantial federal question, and that the jurisdictions below who have ruled on the issue presented have overwhelmingly ruled against the Appellant.

THE OVERWHELMING WEIGHT OF AUTHORITY HAS RULED ADVERSELY TO THE APPELLANT'S CONSTITUTIONAL CLAIMS.

The issue presented by the Appellant for consideration by this Court is whether cocaine is properly scheduled as a Class II Controlled Substance under Minnesota Statute 152.02, Subd. 3(1)(d). He claims that it should properly be scheduled as a Class III Controlled Substance with a correspondingly lesser penalty. The Minnesota Supreme Court has ruled against his claim. *State v. Carlson and Vernon*, 283 NW2d 516 (Aug. 3, 1979).

The Minnesota statute is identical to the federal statute governing the scheduling of Controlled Substances. Federal courts deciding the issue have unanimously ruled adverse to the Appellant's position. Certiorari has been denied by this Court in several of these cases.

A listing of these cases follows:

United States v. Amidzich, 396 F.Supp. 1140, 1147 (E.D. Wisc. 1975);

United States v. Brookins, 383 F.Supp. 1212 (D.N.J. 1974), *summarily affirmed*, 524 F.2d 1404 (3rd Cir. 1975);

United States v. Castro, 401 F.Supp. 120, 126 (N.D. Ill. 1975);

United States v. DiLaura, 394 F.Supp. 770 (D.Mass. 1974);

United States v. Harper, 530 F.2d 829 (9th Cir. 1976), *cert. denied*, 425 US 977 (1976);

United States v. Hobbs, 392 F.Supp. 444 (D.Mass. 1975);

United States v. Kiffer, 477 F.2d 349, 356 (2nd Cir. 1973); *cert. denied*, 414 US 831 (1973);

United States v. Lindelow, 435 F.Supp. 367 (D.Puerto Rico 1977);

United States v. Marshall, 532 F.2d 1279, 1288 (9th Cir. 1976);

United States v. Miller, 387 F.Supp. 1097 (D.Conn. 1975);

United States v. Smaldone, 484 F.2d 311 (10th Cir., 1973), *cert. denied*, 415 US 915 (1974);

United States v. Umentum, 401 F.Supp. 746 (E.D. Wisc. 1975), *aff'd* (issue not raised) 547 F.2d 987 (7th Cir. 1976), *cert. denied*, 430 US 986 (1977).

Appellee therefore requests that this appeal be affirmed without further proceedings. The question presented is not sufficiently substantial to justify the attention of this Court.

Respectfully submitted,

WARREN SPANNAUS
Minnesota Attorney General
820 American Center Bldg.
St. Paul, MN 55101
THOMAS L. JOHNSON
Hennepin County Attorney
VERNON E. BERGSTROM
Chief Appellate Section
By: DAVID W. LARSON
Assistant Hennepin
County Attorney
THOMAS A. WEIST, Esq.
A-2000 Government Center
Minneapolis, MN 55487
612/348-5528
Attorneys for Appellee

Supreme Court, U. S.
FILED
JAN 3 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1979

Docket No. 79-1048

State of Minnesota,

Respondent,

vs.

Jeffrey E. Carlson,

Appellant.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

KURZMAN AND MANAHAN

MARC G. KURZMAN
601 West Butler Square
Minneapolis, MN 55403
(612) 333-4403

Attorney for Appellant

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

THE AUTHORITIES CITED BY APPELLEE IN HIS MOTION TO AFFIRM ARE NOT APPLICABLE IN THIS APPEAL.

The issue presented by the appellant for consideration by this Court is whether cocaine was properly scheduled for penalty purposes as a Class II controlled substance under Minnesota Statute Section 152.02, Subd. 3(1)(d). Appellant asserts that cocaine should properly be scheduled as a Class III, IV or V controlled substance with a correspondingly lesser penalty.

The cases cited by appellee in his Motion to Affirm relate back to the reasoning set forth by this Court in United States v. Carolene Products Company, 304 US 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938), for their starting proposition establishing burdens of

persuasion and concluding that the various Defendants had not met their burden in mounting a Constitutional challenge to the Comprehensive Drug Abuse Prevention and Control Act of 1970, Title XXI, United States Code, Section 801 et seq.

In Carolene, this Court recognized that,

> The Constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, althouth within the prohibited class, is so different from others of the class as to be without the reason for the prohibition.

At page 154. In the instant case, the record shows that there were no determinations by the State Legislature directly or by any other properly constituted body to which this

responsibility was delegated with respect to the classification of cocaine for penalty purposes as a Class II controlled substance. Thus, although the Minnesota Statute is similar to the Comprehensive Drug Abuse Prevention and Control Act of 1970, Title XXI, United States Code, Section 801 et seq., the record before the Courts in Minnesota show conclusively that there was never a determination with respect to the effects of cocaine in the enactment of this Minnesota statute. Thus, under Carolene, there never was a inquiry of the level Constitutionally required before the enforcement of the Statute could lie. Further, the record established conclusively that cocaine is significantly dissimilar to the other substances placed in Class II.

It is appellant's contention that this case presents a properly justiciable issue of sufficient substance and in the context of "drug legislation," is clearly distinguished from the adverse Federal caselaw cited by Appellee, both from the perspective of the issues raised and with the record making this particular challenge one of "first impression."

Respectfully submitted,

By Marc G. Kurzman

and

Karl H. Van D'Elden

KURZMAN AND MANAHAN
601 West Butler Square
Minneapolis, MN 55403
(612) 333-4403

Attorneys for Appellant